

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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REDA GINENA, et al.,

Plaintiffs,

v.

ALASKA AIRLINES, INC.,

Defendant.

Case No. 2:04-cv-01304-MMD-CWH

ORDER REGARDING  
LAW OF THE CASE

**I. BACKGROUND**

In the Joint Pretrial Order (dkt. no. 312), Plaintiffs submitted the following issue of law to the Court:

Whether the Ninth Circuit's statement, "even the story told by the flight crew at the time of the incident does not disclose any action on plaintiffs' part that could amount to a crime," *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 871 (9th Cir. 2010) constitutes the law of the case, so as to warrant a jury instruction that it is established as a matter of law that the story told by the flight crew at the time of the incident does not disclose any action on Plaintiffs' part that could amount to a crime.

**II. ANALYSIS**

**A. Law of the Case Doctrine**

"The doctrine of law of the case generally precludes a court from reconsidering an issue that has already been decided in the identical case, either by the same court or a superior court." *United States v. Real Prop. Located at Incline Village*, 976 F. Supp. 1327, 1353 (D. Nev. 1997) (citations omitted). "The doctrine is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to

1 rest.” *Id.* (citing *Pit River Home and Agric. Coop. Ass’n v. United States*, 30 F.3d 1088,  
2 1097 (9th Cir.1994)).

3 “The law of the case doctrine is routinely characterized not as a limitation on the  
4 power of a tribunal to revisit prior rulings, but rather as a guide to the court’s exercise of  
5 its discretion[.]” *Real Prop.*, 976 F. Supp. at 1353 (citations and quotation marks  
6 omitted). “The doctrine is usually described not as a rule of substantive law, but a rule of  
7 practice designed to protect both the court and the litigants before it from repeated  
8 reargument of issues already decided.” *Id.* (citations omitted). “The doctrine applies to  
9 issues decided explicitly or by necessary implication in the court’s prior ruling.” *Id.*  
10 (citations omitted).

### 11 **B. Analysis**

12 The Ninth Circuit addressed, in relevant part, whether this Court properly granted  
13 summary judgment on Plaintiffs’ Warsaw Convention delay claim based on the  
14 provisions of the Tokyo Convention. *Eid*, 621 F.3d 858. Deciding an issue of first  
15 impression for U.S. courts, the Ninth Circuit held that the Tokyo Convention standard for  
16 analyzing a Captain’s conduct was one of reasonableness. *Id.* at 866, 868. The Ninth  
17 Circuit then reviewed the summary judgment record and held that a jury could conclude  
18 that the Captain’s conduct was not reasonable. *Eid*, 621 F.3d at 868-72. The court  
19 accordingly remanded the case for a jury to decide whether Captain Swanigan’s  
20 behavior was reasonable under the Tokyo Convention. *Id.* at 872.

21 The Court determines that the Ninth Circuit’s statement, “even the story told by  
22 the flight crew at the time of the incident does not disclose any action on plaintiffs’ part  
23 that could amount to a crime,” *Eid*, 621 F.3d at 871, is not the law of the case. The  
24 Court agrees with Defendant that the statement is dicta as it was not necessary to  
25 reverse the grant of summary judgment. The statement appears in the portion of the  
26 Ninth Circuit decision discussing whether summary judgment was proper. The Court  
27 explicitly determined that the reasonableness of Captain Swanigan’s decision is a jury  
28 question. *Eid*, 621 F.3d at 869, 871-872. Including a jury instruction stating that it is

1 established as a matter of law that Plaintiffs' actions could not have amounted to a crime  
2 would go against the gravamen of the Ninth Circuit opinion. That opinion made clear  
3 that it was for the jury, not the Court, to decide whether or not Captain Swanigan's  
4 decision to divert the plane and deliver Plaintiffs to the police post-diversion was  
5 reasonable. Captain Swanigan's stated reason for these actions was that he believed  
6 Plaintiffs violated 49 U.S.C. § 46504. See *id.* at 871. Deciding as a matter of law that  
7 Plaintiffs did not commit a crime would essentially establish that this belief was  
8 incorrect.<sup>1</sup>

9 Plaintiffs argue that Defendant wrongly conflates two related but distinct issues.  
10 Plaintiffs agree with Defendant that the Ninth Circuit ruled that the jury must decide  
11 whether the pilot had reasonable grounds to believe Plaintiffs had committed a serious  
12 offense. Plaintiffs disagree, however, that this determination is at issue here. Rather,  
13 Plaintiffs assert that whether the flight crew's story disclosed any evidence that could  
14 amount to a crime is a separate and already-decided issue. The Court notes the  
15 distinction. However, the two issues are closely interrelated. Were the Court to inform  
16 the jury that the story told by the flight crew at the time of the incident affirmatively does  
17 not disclose any action on Plaintiffs' part which could be criminal, this would, in all  
18 practicality, eviscerate Defendant's Tokyo Convention defense.

19 Despite the Court's holding on this point, whether or not Plaintiffs' behavior could  
20 have violated 49 U.S.C. § 46504, or was otherwise illegal or disruptive is only relevant to  
21 establish the reasonableness of Defendant's employee's actions. Plaintiffs have  
22 requested that evidence relevant to whether Plaintiffs violated 49 U.S.C. § 46504 not be  
23 admitted, such as the post-October 1, 2003, FBI investigation and certain FBI  
24 memoranda. The admissibility of the post-October 1, 2003, investigation evidence was  
25 addressed in the Court's prior order on Plaintiffs' Motion in Limine. (Dkt. no. 305.)

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27 <sup>1</sup>Moreover, the Ninth Circuit was considering the evidence under the summary  
28 judgment standard. In fact, it specifically stated that "[v]iewing plaintiff's version of the  
facts, they did absolutely nothing that anyone could reasonably believe was criminal."

1 Evidence regarding whether Plaintiffs' behavior could have constituted a violation of 49  
2 U.S.C. § 46504 will only be admitted when discussing the reasonableness of  
3 Defendant's employees' actions (for the Warsaw Convention claim) or their lack of  
4 malice (for the defamation claims).

5 **III. CONCLUSION**

6 IT IS HEREBY ORDERED that the Ninth Circuit's statement referenced in  
7 Plaintiffs' Trial Brief (dkt. no. 312) does not constitute the law of the case.

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9 ENTERED THIS 25<sup>th</sup> day of February 2013.

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13 MIRANDA M. DU  
14 UNITED STATES DISTRICT JUDGE  
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